83 - 2075

No.

In the Supreme Court of the United States

JOHN RANZONI
AND
ROBERT CUDDEBACK
Petitioners,

V

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

A

WHETHER THE GOVERNMENT FAILED TO PROVE FOR THE PURPOSES OF 18 USC, SECTION 2315, THAT THE ALLEGEDLY STOLEN LIQUOR WAS IN INTERSTATE COMMERCE AT THE TIME OF THE INVOLVEMENT OF PETITIONERS RANZONI AND CUDDEBACK THEREWITH, THEREBY DEPRIVING THE DISTRICT COURT OF THE REQUISITE JURISDICTION TO TRY THEM ON THE CHARGES BROUGHT AGAINST THEM?

B

WHETHER THE GOVERNMENT'S FAILURE TO PROVIDE THE PETITIONERS RANZONI AND CUDDEBACK WITH CERTAIN EXCULPATORY EVIDENCE PRIOR TO TRIAL CONSTITUTED A DENIAL OF DUE PROCESS NECESSITATING REVERSAL?

C

WHETHER THE EVIDENCE SHOWED THAT A GOVERNMENT INFORMER IMPROPERLY INDUCED THE PETITIONER CUDDEBACK TO BECOME INVOLVED WITH CRIMINAL ACTIVITY SO AS TO CONSTITUTE ENTRAPMENT AS A MATTER OF LAW?

D

WHETHER THE GOVERNMENT FAILED TO PRODUCE EVIDENCE WHEREBY A RATIONAL TRIER OF FACT COULD FIND BEYOND A REASONABLE DOUBT THAT PETITIONERS RANZONI AND CUDDEBACK KNEW, PRIOR TO THEIR ARREST, THAT THE LIQUOR WAS STOLEN?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN RANZONI and ROBERT CUDDEBACK, by and through their attorney, ARMAND D. BOVE, petition herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the lower court's judgment of conviction for violation of 18 USC, Section 2315.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed April 26, 1984, affirming the District Court's finding of guilt is reprinted in full as Appendix B hereto. That opinion has not, as of this writing, been published.

JURISDICTION

The Opinion and Order appealed from was filed April 26, 1984 and an Order Recalling the Mandate and Reinstating Consolidated Appeals was entered on June 5, 1984, by the Sixth Circuit Court of Appeals. The jurisdiction of this court is invoked under 28 USC, Section 1254(1).

STATUTORY PROVISION INVOLVED

The Statutory Provision involved herein is 18 USC, Section 2315, and provides as follows:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities,

or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, altering, or counterfeiting any security or tax stamp, or any part thereof —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; Oct. 4, 1961, Pub.L. 87-371, Section 3, 75 Stat. 802.

STATEMENT OF THE CASE

The Petitioners, JOHN RANZONI and ROBERT CUDDEBACK, were each charged in one count indictments with knowingly and wilfully receiving, concealing, bartering, selling and disposing of stolen liquor, which liquor was in interstate commerce, in violation of 18 USC, Section 2315. Following a jury trial in the United States District Court for the Eastern District of Michigan, both Petitioners were convicted of Count One of the indictment. Petitioner Ranzoni was sentenced to four years custody of the Attorney General and Petitioner Cuddeback was sentenced to the custody of the Attorney General for two years with all but ninety (90) days suspended and two years probation.

At trial, evidence showed that on August 20, 1982, a truck trailer containing a load of alcholic beverages, owned by Mohawk Liquor, a Novi, Michigan based company, was spending the weekend parked at the storage facility of Transportation Services, Inc., located on Telegraph Road in Brownston Township, Michigan.

The load in question was scheduled to depart from the premises of Transportation Services, Inc. on August 22, 1982. However, when the driver of the tractor trailer who was to haul it to Pennsylvania arrived at Transportation Services, Inc. to secure the load, he discovered that it was missing.

Anthony J. Pelligrino, president and owner of Transportation Services, Inc., contacted the FBI and promulgated a reward offer of Five Thousand Dollars which he later raised to Ten Thousand Dollars. He testified that at the time of the theft, he thought that he was insured to cover the theft but later learned that he was not so insured.

Pursuant to a telephone call from Bob Carr, Ranzoni met with Carr, in the early afternoon of August 20, 1982. Carr told Ranzoni that he had a load of liquor that the owners

wanted disposed of in order to collect the insurance proceeds. Carr told Ranzoni that the owners wanted one third of the proceeds of the insurance and One Thousand Dollars in advance. Carr solicited Ranzoni to help him dispose of the liquor and to arrange a place for it to be stored.

On August 22, 1982, Ranzoni paid the One Thousand Dollars to Carr and they both met at Universal Refrigeration warehouse to store the liquor.

Ranzoni sold two hundred cases of the liquor to a bar owner, Ralph Hargis for Six Hundred Dollars. He also attempted to sell part of it to Chuck Boglos but that sale was never consummated. Ranzoni told both Hargis and Boglos that the liquor was not stolen.

In September of 1982, Ranzoni contacted Cuddeback by phone and asked if he would be interested in purchasing some of the liquor. Because of the price being asked, Cuddeback inquired as to whether it was stolen. Ranzoni told him that it was not. Cuddeback was not interested in purchasing the liquor.

Cuddeback is the owner of a restaurant in Westland, Michigan, called Bob's Hideway. During this period, Cuddeback had been hospitalized from August 18, 1982 to August 26, 1982, for purposes of heart surgery and did not resume full time work at the bar until shortly after Ranzoni had called him.

Kim McKinney, who started a video game business in November of 1981, was looking for locations to put his video games, and in April of 1982, Cuddeback introduced McKinney to one Ed Morelli who owned a club called "Ma Bell's". Morelli agreed to have some video games placed in his establishment, and, as part of the arrangement, McKinney provided Morelli with a video game for his home for payments of Two Hundred Dollars per month, for twelve months, with no interest.

Morelli fell behind on his payments on the video game. McKinney attempted to contact Morelli regarding payments on the game, but encountered some difficulty in getting Morelli to return his telephone calls. In September of 1982, McKinney went to Bob's Hideaway Lounge and asked Cuddeback to help him obtain the payments from Morelli. McKinney explained to Cuddeback that Morelli would not return his telephone calls, and asked Cuddeback to telephone Morelli on his behalf.

Pursuant to McKinney's request, Cuddeback telephoned Morelli, and eventually made contact with him. Cuddeback inquired of Morelli regarding the money owed to McKinney. Morelli told Cuddeback to inform McKinney that the payments would be coming shortly, and then asked Cuddeback if he knew of any "good deals" that were around.

Cuddeback assumed that Morelli was looking for a bar to purchase, since the bar that Morelli has previously owned had been closed. Based on that assumption, Cuddeback told Morelli that he knew of no "good bar deals" at that time. The conversation was interrupted briefly. Then Morelli called back and explained that he was not necessarily looking for a "bar deal", exclusively, but anything that he "make some money on". Morelli further explained that he has been "hurting" since his bar had been closed.

Cuddeback repeatedly told Morelli that he knew of nothing whereby Morelli could make some money. Finally, Cuddeback told Morelli that a man had called him saying that he had some liquor available at a good price. Cuddeback told Morelli that he was suspicious that the liquor was stolen because of the price, although he had been informed differently. Morelli replied, "Well, you're in the bar business, there must be some deals around. I need to make some money. I'm closed up. I'm trying to get some things going and I need some money." Morelli asked Cuddeback to find out about the liquor.

Cuddeback called Ranzoni and asked him if the liquor was still available, and Ranzoni replied that it was. The next day, September 23, 1983, Morelli telephoned Cuddeback and asked him whether he had found out about the liquor. Cuddeback told Morelli that he would put him in contact with the man selling the liquor and a meeting between Cuddeback and Morelli was set up for that evening at 6:00 p.m.

One the same day, Morelli telephoned Special Agent Jesse Lopez of the Federal Bureau of Investigation. Lopez had first become involved with the case when he was informed of the missing liquor by Pelligrino on August 23, 1982. Lopez had known Morelli for four years. Morelli had assisted him in two other matters. Before Lopez met him, Morelli was on the F.B.I. payroll as an informant. Pursuant to his conversation with Morelli, Lopez made arrangements to meet with Morelli at Cuddeback's establishment that evening.

Before arriving at Cuddeback's establishment, Lopez met with Morelli, Morelli's lawyer, and Pelligrino at a restaurant on Telegraph Road in or near Detroit. At this meeting, Morelli's attorney drafted an agreement between Morelli and Pelligrino which provided if Morelli could provide information which would lead to the recovery of the liquor, he would be paid the Ten Thousand Dollar reward that Pelligrino had offered.

Morelli and Lopez arrived at Cuddeback's establishment at around 8:00-8:30 p.m. Another agent was present as back-up, sitting apart from Cuddeback, Morelli and Lopez. Morelli introduced Lopez to Cuddeback as "Ruben Rivera", and told Cuddeback that Lopez (Rivera) was interested in the liquor. Morelli explained that he did not have the money to pay for the liquor, whereas Lopez did.

Cuddeback asked Morelli if he wanted him to call the man with the liquor and set up a meeting, or if he wanted to talk

with the man himself. Morelli indicated that he did not want to talk to the man, but wanted Cuddeback to contact him.

Cuddeback called Ranzoni and asked him to come to the bar and talk with Morelli. Ranzoni told Cuddeback to ask Morelli if he had the money, and where to deliver the liquor. Cuddeback informed Lopez and Morelli that the price was Thirty Five Dollars a case. Lopex replied that the price was too high because the liquor was stolen, and the load contained more Kahlua than could be used in the entire State of Michigan in one year.

Cuddeback relayed the Twenty Five Dollar offer to Ranzoni and this offer was accepted. A total price of Fourteen Thousand, Five Hundred Dollars, as a round figure, was set for the entire load of liquor.

Cuddeback advised Lopez that Lopez and his people were not to go to the warehouse where the liquor was being stored. Lopez then told Cuddeback that he would meet with the person who had the liquor and transfer the load to a trailer that he planned to borrow. Lopez further told Cuddeback that he would arrange for an inside warehouse to which the liquor should be brought, and that he would telephone Cuddeback at 10:30 a.m. the next day with an address to which the liquor could be brought.

Lopez telephoned Cuddeback the next morning as arranged. He told Cuddeback that he had arranged for a warehouse at which to transfer the liquor. The warehouse was located on Heslip Road in Novi, Michigan. Lopez would be with Cuddeback at his bar at the time that the liquor was transferred, would have the money in his possession, and would give Cuddeback the money when he received word that his people had the liquor in their truck.

Later that morning, Lopez drove to the vicinity of Cuddeback's establishment accompanied by two other agents. He

parked two blocks away from the bar and waited for the agents whom he had dispatched to the warehouse in Novi to contact him by radio and inform him that they had made the arrest of the individuals delivering the liquor to that location. He heard from the agents at the warehouse in Novi by radio at approximately 11:50 to 11:55 a.m. The agents informed him that they had made the arrest of two individuals and had a rental truck in their possession which contained Kahlua, Scotch, Tequila and other liquor.

Lopez then sent the two agents who were with him into Cuddeback's establishment to sit at the bar and have a drink. Lopez waited two or three minutes thereafter, and then went into the bar. Lopez carried a briefcase into the bar which contained a tape recorder. The conversation between Cuddeback and Lopez was recorded, but the recording was mostly inaudible, and there was nothing on the tape whereby Cuddeback acknowledged that the liquor was stolen.

Cuddeback informed Lopez that only half the load could be put on the truck, and that two trips would have to be made. Cuddeback also informed Lopez that he did not know where the load was being stored. At that point, Lopez placed Cuddeback under arrest. The rest of the liquor which had not been delivered to the warehouse in Novi was subsequently discovered at the warehouse of Universal Refrigeration.

Trial commenced on April 22, 1983. Pursuant to request, the Government provided Petitioners Ranzoni and Cuddeback with a package which was the F.B.I.'s investigative material. The fact that Transportation Services, Inc. had no insurance on the stolen load did not appear in this investigative material, and was thus revealed for the first time at trial, although Agent Lopez had specifically questioned Pelligrino regarding insurance as early as September 27, 1982, and Pelligrino informed him of the existence of the insurance. Lopez testified that this case could have involved insurance fraud. Nothing

concerning the reward paid to Morelli by Pelligrino was contained in the investigative material. Lopez had served as a conduit for Seven Thousand Dollars of the reward. The name of Robert Carr and the fact that he was in Federal Prison in Terre Haute, Indiana, was not disclosed to Defendant Ranzoni at any time prior to trial.

Following the jury's verdicts of guilty, both Petitioners moved for new trials which were denied by the trial judge. (*Order* entered June 30, 1983, and *Memorandum Opinion and Order,* dated July 19, 1983)

Both Petitioners appealed their convictions to the Sixth Circuit Court of Appeals which Court affirmed their convictions by an Opinion and Order dated April 26, 1984.

On May 18, 1984, a Mandate was issued which was subsequently recalled and the consolidated cases were reinstated on June 5, 1984.

The herein Petition for Certiorari is now being brought.

REASONS FOR GRANTING THE WRIT

A

THE GOODS WERE NOT MOVING IN INTERSTATE COMMERCE AS REQUIRED BY 18 USC, SECTION 2315

The decision below adds a heretofore unrealized dimension to 18 USC, Section 2315. It brings within the reach of that criminal statute, behavior that is well covered under State of Michigan criminal laws and was never meant to be usurped by Federal law.

The court below relied on an opinion of this court *McElroy* v *United States,* 455 US 642 (1982) in disposing of the question

whether goods, at rest in the State of origin, are, in fact, moving in Interstate Commerce. In the *McElroy* case, this court was faced with a situation which involved the interpretation of 18 USC 2314 which refers to "transporting in interstate or foreign commerce." In the *McElroy* case, there was no question that McElroy crossed a state line while in possession of the securities in question. The issue then became whether federal prosecutors had to prove that the securities were forged before McElroy had crossed state lines. This court held that Congress did not intend to require prosecutors to prove that the securities had been forged before crossing state lines. It was sufficient, the court held, that McElroy's transportation of the forged check within Pennsylvania if it was a continuation of the movement which began out of state, violated 18 USC 2314.

The court in the *McElroy* case, in footnote 21, touched on the interpretation of 18 USC 2315 as did the court below on page 6 of its opinion of April 26, 1984, as found in footnote 5.

In footnote 21 of the *McElroy* decision, the court indicated:

> Cases reviewing other statutes, with slightly different "interstate commerce" provisions arrive at the same result that we reach today. In United States v. Tobin, 576 F.2d 687 (CA5), cert. denied, 439 U.S. 1051 (1978), the defendants were convicted of receiving and conspiring to sell stolen goods "moving as, or which are a part of, or which constitute interstate. . . commerce" in violation of 18 U.S.C. Section 2315. The court rejected the defendants' argument that the stolen goods had been taken out of interstate commerce by coming to rest, holding that "[s]o long as its movement within the destination state can be considered a continuation of the movement that began out of state the prerequisite of 18 U.S.C. Section 2315 is satisfied." Id., at 692. See United States v. Luman, 624 F.2d 152, 155 (CA10 1980) (18 U.S.C. Section 2315); United States v Licavoli, 604

F.2d 613, 6240625 (DA9 1979) (18 U.S.C. Section 2315), cert. denied, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980); United States v. Garber, 626 F.2d 1144, 1148 (CA3 1980) construing similar language in 18 U.S.C. Section 659, the court held that "[d]elays enroute do not deprive shipments of continued characterization as interstate or foreign so long as the goods have not yet reached their destination"), cert. denied, 449 U.S. 1079 (1981); United States v Maddox, 394 F.2d 297, 299-300 (CA4 1968) (18 U.S.C. Section 659); United States v Hiscott, 586 F.2d 1271, 1274 (CA8 1978) (18 U.S.C. Section 2131); United States v. Goble, 512 F.2d 458, 469 (DA6 1975) (18 U.S.C. Section 2313).

The court, in citing the *Tobin* case in its *McElroy* footnote, was concerned with stolen goods coming to a stop in the destination state after having crossed state lines and indicated that so long as the movement of the goods within the destination state can be considered a continuation of the movement that began out of state, the prerequisite of 18 U.S.C. 2315 is satisfied.

Neither the *Tobin* court nor the *McElroy* court ever touched upon or considered goods stolen prior to *any* movement from the state of origin to the destination state. That is the fact in the instant case. The goods were taken from the Transportation Services Inc. yard before the goods began any movement whatsoever.

This court in its McElroy decision, in footnote 21, also refers to *United States* v *Luman*, 624 F2d 152 (CA10 1980). In the *Luman* case we find the same situation as found in all of the previously considered cases. In the *Luman* case, the defendants were charged under 18 USC 2315. The defendants stole certain drill bits in Wamsutter, Wyoming, and in a comparatively short time turned up in the possession of the defendants in Tulsa, Oklahoma. In the *Luman* case, the evidence was such

as to permit a finding that the drill bits had not "come to rest" in Oklahoma, but still were a part of the total scheme of interstate commerce. In the interpretation and consideration of 18 USC 2315 in the *Luman* case, the facts of the instant case had never been considered. The *Luman* case, as the prior cases, dealt with goods which had physically crossed state lines.

The court below futher indicated at page 5 of its opinion that there are "surprisingly few federal courts that have considered the criteria for determining when goods are in interstate commerce for purposes of Section 2315."

It is further urged upon the court that at least two circuits have rendered decisions which are in conflict with each other.

The court below at page 5 of its opinion, cited the case of *United States* v *Henneberry*, 719 F2d 941, (8th Circuit 1983). It failed to cite the conflicting decision of *United States* v *Thies*, 569 F2d 1268, (CA Third Circuit 1978).

In the *Henneberry* case the court held that stolen goods in the state of origin which had never left that state were sufficiently in Interstate Commerce under 18 USC 659. The court indicated that there is no requirement of literal movement. The goods which are part of or constitute an interstate shipment are covered by the statute even if not in motion at the time of the theft.

In *United States* v *Thies*, 569 F2d 1268, 45 ALR Fed 519 (CA3, 1978) Defendants Thies and Marcus were convicted of conspiracy and the substantive offense of selling Pinal County Development Association Industrial Revenue bonds in violation of 18 USC, Section 2315. The indictment charged that the securities were moving as, were a part of, and constituted interstate commerce.

The evidence brought forward at trial showed that the Pinal County Development Association issued coupon bearer bonds, in 1964, to finance an industrial complex in Pinal

County, Arizona. Sometime before 1967, a large quantity of the bonds were taken to California by one Haldiman. In 1967, the Superior Court of Arizona, for the County of Pinal, declared the bond indenture agreement null and void and ordered the return of all bonds for destruction.

During 1974 and 1975, Defendant Marcus deposited more than $100,000 face value of coupons from Pinal County Development Association bonds in a number of banks in several states, including New York. He was living in Newark, New Jersey at the time.

Marcus was arrested in connection with these activities and confined to the Metropolitan Correction Center. There he confided in another inmate that he had negotiated the coupons and had access to substantial quantities of the bonds. Marcus' confident advised the F.B.I. of the Defendant's admission, and at the Bureau's request, maneuvered to have Marcus sell some of the bonds.

Marcus was introduced to F.B.I. undercover agent Louis Tosti as a person who was interested in buying Pinal bonds. Marcus directed Tosti to his "outside" man, Defendant Thies, a member of the New York Bar.

Tosti met with Thies, and, after some negotiation, agreed to buy one million dollars of the bonds for Fifty Thousand Dollars. After Marcus learned that a sale had been agreed upon, he sent several letters. One, addressed to a Steve Vento in New York City, stated that Marcus had directed his friend in New Jersey to give Fifteen Thousand of the Fifty Thousand Dollars to Vento.

In preparation for the purchase, Tosti called Thies who instructed him to take Fifty Thousand Dollars in cash to a Newark bank. Tosti and Thies met at the Newark bank on May 10, 1976. Tosti exchanged $50,000 for the bonds. Thies then took the cash to the bank's safe deposit box area and was arrested.

On appeal the Defendants asserted that the prosecution had failed to establish the statutory nexus with interstate commerce. The court first discussed the statutory construction problem it was faced with, thusly:

> "Congress has used the commerce clause as a basis for its exercise of criminal jurisdiction in a variety of circumstances. . . In construing the statute, the question is not usually the extent to which Congress *may* exercise its power under the Commerce Clause but, rather, how far it chose to go in a specific instance." 569 F2d at 1271. (Emphasis in original.)

The court next discussed prior decisions on the issue it was faced with, and the legislative history of 18 USC, Section 2315:

> "This court was confronted with the contention that no interstate commerce was involved where only a brief period elapsed between theft and sale in *United States* v *Marcus*, 429 F2d 654 (3d Cir (1970)). There, we said: 'While at some point all articles of commerce may cease to be part of an interstate shipment, all that is required under this and similar statutes is for the act prohibited to be part of a larger plan or scheme by which the goods are moved in an interstate manner.'
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> * * *
>
> "Section 2315 speaks of 'moving as, or which are a part of or which constitute interstate commerce.' As the Supreme Court observed in *Barrett* v *United States, supra*, Congress chooses tense with an intent to define the application of the statute.
>
> "The legislative history is quite sparse but does support a somewhat restrictive view. The predecessor to Section 2315 was the National Stolen Property Act of 1934 . . . In passing and amending that Act, Congress made it

clear that the statute was not intended to be all-encompassing: 'This bill does not go so far as to make larceny, or other offenses which are purely intrastate, interstate in character, subjecting the offenders to Federal jurisdiction.' 84 Cong Rec 9411 (1935) (Remarks of Senator King)." 569 F2d at 1272.

Then the court analyzed the evidence that had been put forward in the case before it to determine whether it was sufficient to sustain a finding that the transaction in question was interstate in character so as to support a conviction under 18 USC, Section 2315.

"According to the testimony, the bonds may have been part of those taken from Arizona as early as 1964 or retained after the court decree in 1967. The first time that they reappeared after those dates was in New Jersey in 1976, a span of between 9 and 13 years. There is no evidence of when the bonds were moved from California or Arizona, when they arrived in New Jersey, or whether they were present in any other state in the interim. The evidence that coupons from the bonds were deposited in banks in several states within a comparatively short time before the sale occurred in New Jersey is not enough. Testimony at the trial established that coupons may be detached from the bonds at a bank when depositing coupons. Experience would indicate that it would be uncommon for a possessor to carry bulky bonds to a bank when his only purpose was to deposit small-sized coupons. Moreover, legitimate owners of valuable bearer bonds are not likely to carry such securities about unnecessarily. The fact that coupons travelled in interstate commerce, therefore, may not be used to infer that the bonds themselves were similarly transported.

"The government also introduced evidence that in April, 1975, the first guest to occupy Marcus' Newark

hotel room after he had checked out found an envelope in the room containing three bonds. A label affixed to the envelope showed John Thies of Scarsdale, New York as the addressee, and listed the return address of a New York trade association. The envelope was postmarked in New York on October 31, 1974. In addition to the bonds, it contained a carbon copy of a letter written by the defendant Thies to the Social Security Administration on behalf of a client.

"This evidence established nothing relevant other than bonds were in Marcus' New Jersey room and that perhaps Thies had been there. It does not show that the bonds were in the envelope when it was mailed in New York or that the bonds were ever in that state. The evidence furnishes additional proof that Marcus and Thies were associated in their enterprise in New Jersey and bonds were present in that state, but it does not establish interstate commerce.

"...nothing more is established than that the bonds were in California or Arizona in 1967 and in New Jersey in 1976. There is simply not enough to show that the bond transaction constituted interstate commerce in 1976." 569 F2d at 1273.

What is clear from the opinion in *Thies,* and the authorities cited therein, is that the stolen property must actually cross state lines as part of the transaction for which criminal charges are brought in order for there to be a conviction under 18 USC, Section 2315. In that case, although it was clear that the bonds had crossed state lines at some point in time, the absence of any evidence that they had crossed state lines as part of their sale to Tosti was sufficient to warrant reversal of the Defendants' convictions.

It is also clear from the holding in *Thies* that, for purposes of 18 USC, Section 2315, it is not sufficient that the items of

stolen property were scheduled to be shipped across state lines before they were stolen. What is required under the statute is "'for the act prohibited to be *part of* a larger plan or scheme *by which* the goods are moved in an interstate manner,'" 569 F2d at 1272. (Emphasis added.) Congress did not intend for the statute to "'go so far as to make larceny, or other *offenses* which are purely intrastate, interstate in character, subjecting the offenders to federal jurisdiction.'" 569 F2d at 1272. (Emphasis added.) Thus, under *Thies,* for there to be a valid conviction under 18 USC, Section 2315, the items of stolen property must actually cross state lines, and they must do so as part of the criminal enterprise.

The Court's construction of 18 USC, Section 2315 in *Thies* comports with the wording of the statute which reads, in pertinent part, as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate of foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken...
>
> * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

As was noted in *Thies,* "Congress chooses tense with an intent to define the application of the statute." 569 F2d at 1272. In 18 USC, Section 2315, "interstate or foreign commerce" is referred to in the present tense only. The statute does not proscribe the initial taking of property, but the receiving, concealing, storing, bartering, selling, or disposing of property which has already been stolen. Thus, the statute

does not, according to its terms, apply to goods which are in interstate commerce at the time they are stolen, or immediately prior thereto, but to goods which are in interstate commerce at the time that they are received, concealed, stored, bartered, sold, or disposed of, that is, goods which are in interstate commerce as part of a criminal enterprise.

Under the unambiguous wording of 18 USC, Section 2315, its legislative history, and the holding in *Thies,* it cannot be contended in the present case, that the liquor was in interstate commerce at the time that Petitioner Ranzoni allegedly sold or disposed of it. After the liquor was removed from the storage area of Transportation Services, Inc., all transactions concerning the liquor took place within the State of Michigan, and the liquor never crossed state lines. Thus, the Government failed to prove one essential element for a violation of 18 USC, Section 2315, that element being that the liquor was in interstate commerce at the time of its alleged sale. Because the allegedly stolen liquor never left the State of Michigan, the District Court lacked the requisite jurisdiction to try Ranzoni and Cuddeback on the charges brought against them. Their convictions, therefore, should be vacated.

Further, this Writ should be granted since one Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter.

Further, the court below has decided an important question of federal law which has not been squarely settled by this court.

B

GOVERNMENT FAILED TO DISCLOSE EXCULPATORY EVIDENCE

Thus, the Government, in a criminal case, has an affirmative constitutional duty to disclose to the defense all exculpatory evidence in its possession, regardless of whether a specific

request was made therefor. Constitutional error requiring reversal takes place when the Government fails to disclose to a Defendant exculpatory evidence which creates a reasonable doubt about guilt. Furthermore, the constitutional significance of the prosecutorial error does not turn upon the good or bad faith of the prosecutor, but upon the materiality of the evidence in question. Cf. *Brady* v *Maryland* 373 US 83 (1963); *United States* v *Agurs,* 427 US 97 (1976).

> "The principle. . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 US at 87.

In the present case, if the Government had disclosed to Ranzoni and Cuddeback prior to trial, that Transportation Services, Inc., had taken out insurance on the allegedly stolen load of liquor, the outcome of the trial would doubtlessly have been much different. Special Agent Lopez testified that he had considered that he might be faced with a possible case of insurance fraud. Petitioner Ranzoni testified that at the time he first became involved with the liquor, he was specifically told that the liquor was being sold for insurance purposes. Had Defendant Ranzoni been informed that such insurance did, in fact, exist, then pretrial investigation on behalf of Petitioners could have been directed toward the fact that the liquor was not actually stolen out of the storage area of Transportation Services, Inc., but was, rather, intentionally disposed of in order to defraud an insurance company, and Petitioners could have prepared the defense recognized in *United States* v *Bennett,* 665 F2d 16 (CA2, 1981).

In *Bennett,* the Defendant had been convicted under, among other statutes, 18 USC, Section 2315. The Defendant, Bennett, asserted that he did not know that the property in question had been stolen, but was under the impression that he

was involved in a scheme to defraud the owner's insurer. The United States Court of Appeals for the Second Circuit reversed Bennett's conviction, stating as follows:

> "Because the concept of 'stolen' property requires an interference with the property rights of its owner, property that has been transported, sold, or otherwise disposed of, with the consent of the owner cannot be considered 'stolen' within the meaning of Sections 2312-2315... Assuming the truth of Bennett's assertions, therefore, we conclude that, however reprehensible his attempts to defraud may have been and whatever laws he may thereby have violated, his acts would not be within the scope of Sections 2312-2315." 665 F2d at 22.

Thus, the Government's conduct, in the present case, effectively deprived the Defendants of an opportunity to prepare, and thereby, adequately raise, a defense that clearly would have created a reasonable doubt in the minds of rational jurors as to whether Petitioners were guilty of a violation of 18 USC, Section 2315. If the liquor was not, in fact, stolen, but was disposed of for purposes of insurance fraud, then the Petitioners herein cannot be guilty of selling or disposing of stolen property. The failure to disclose matters that would provide the Petitioners with a reasonable opportunity to raise this defense constituted a denial of due process under *Brady* and *Agurs,* thus requiring a reversal of Ranzoni's conviction.

Regarding the existence and whereabouts of Robert Carr, had Ranzoni and Cuddeback been informed of this prior to trial, then they could have secured the attendance at trial of a witness who would have testified as to whether he informed Ranzoni that the liquor was being disposed of for insurance purposes. Indeed, Carr would have been able to testify whether the disposition of the liquor was actually for the purpose of defrauding the insurer for Transportation Services, Inc. Thus, the testimony that Carr would have provided had he

been called as a witness would have provided material evidence, and the failure on the part of the Government to inform Ranzoni and Cuddeback of Carr's existence and whereabouts constituted a denial of due process. The fact that it cannot be said with certainty what Carr's testimony would have consisted of does not help the Government's position in this regard since "the defendants should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs,* supra, at 111.

It is true that the insurance on the allegedly stolen liquor, the reward money paid to Morelli, and the existence of Robert Carr were testified to at trial. However, this fact alters neither the effect nor the prejudicial nature of the Government's failure to disclose these matters prior to trial. As was said in *Schwartzmiller* v *Winters,* 99 Idaho 38, 576 P2d 1052 (1978):

> "... both this Court and the U.S. Supreme Court have reversed convictions when important evidence had been either suppressed or withheld by the prosecution... Most typically this problem arises when the defendant learns of exculpatory evidence after a verdict has already been rendered. The basic reason for reversing a conviction in such cases, when it is necessary to do so, is because the prosecution's failure to disclose evidence deprived the defense of an opportunity to have a fair hearing on the questions of guilt and punishment. We see no reason why the same rule should not apply when the failure of the State if discovered during trial." 576 P2d at 1053-1054.

In *United States* v *Campagnuolo,* 592 F2d 852 (CA5, 1979), the Court said:

> "This Court has interpreted *Brady* to require the government 'to produce *at the appropriate time* requested evidence which is materially favorable to the accused either as direct or impeaching evidence.'... Courts have suggested

> that in some circumstances the 'appropriate time' for discovery is prior to trial: It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial, and that the effective implementation of *Brady* v *Maryland* must therefore require earlier production in at least some situations.'' 592 F2d at 859. (Emphasis in original.)

And in *United States* v *Gleason,* 265 F Supp 880 (S.D.N.Y., 1967) the Court stated as follows:

> ''It seems doubtful, however, that there should be a blanket rule postponing to the trial all disclosures of the type in question. For example, where the prosecutor knows of witnesses potentially useful to the defense, does not intend to call such witnesses himself, and knows — or should reasonably be expected to suppose — that his knowledge is not shared by defense counsel, the information may come too late for effective preparation if it is not delivered until the case is on trial. * * * Other kinds of instances will undoubtedly arise where the Government 'has in its exclusive possession specific, concrete evidence' of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense.'' 265 F Supp at 884–885.

With respect to the Government's failure to disclose the existence and whereabouts of Robert Carr, it is clear that the aforementioned prejudice worked against Petitioners and could not be remedied merely by the fact that Carr's name was mentioned during the testimony of witnesses. No adequate substitute for Carr's testimony at trial could be invented. As to the reward money paid to Morelli and the insurance on the allegedly stolen liquor, the former would have added substantial weight to Petitioners' defense. Defenses require time prior to trial for their preparation, and

disclosure of these facts at trial was not sufficient to provide the Petitioners with a fair trial.

That the Government's conduct in withholding material, exculpatory evidence from the Petitioners severely prejudiced them.

C

GOVERNMENT INFORMER ENTRAPPED CUDDEBACK

The law with respect to entrapment was stated in *United States* v *Grosser*, 339 F2d 102 (CA6, 1964) as follows:

> "If the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion or inducement lured into the commission of a criminal act, entrapment exists and the Government is estopped by sound public policy from prosecution therefor." 339 F2d at 108.

In *Sherman* v *United States*, 356 US 369 (1958), in a prosecution in the United States District Court for the Southern District of New York for unlawful sales of narcotics, it was established by the undisputed testimony of the prosecution's witnesses that the sales, made to a Government informer, were brought about by the informer's persistent solicitation in the face of obvious reluctance on the part of the defendant, whom the informer believed to be undergoing a cure for narcotics addicts, and by the informer's appeals to sympathy based on mutual experiences with narcotics addiction and the informer's tale of his suffering. The issue of entrapment went to the jury, and a conviction resulted. The Court of Appeals for the Second Circuit affirmed.

On certiorari, the United States Supreme Court reversed the judgment below and remanded the case to the District Court with instructions to dismiss the indictment, concluding "from the evidence that entrapment was established as a matter of law." 356 US at 373, and stating as follows:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" 287 US at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.
>
> "However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law enforcement officials. (Emphasis supplied.) See 287 US, at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 US, at 372-373.

The factors which led to the Supreme Court's ruling in *Sherman* exist in the present case. The evidence was uncontroverted that, prior to his conversation with Morelli regarding the allegedly stolen liquor, Cuddeback informed Ranzoni that he wanted nothing to do with the liquor when Ranzoni first

sought his assistance in selling the liquor. It was also undisputed that when Morelli inquired of Cuddeback as to the existence of any lucrative business deals, Cuddeback manifested great reluctance to inform Morelli of Ranzoni's desire to dispose of the liquor, and that it was only after persistent urging on the part of Morelli, coupled with Morelli's appeal to Cuddeback's sympathy by making statements as to his poor financial condition, that Cuddeback relented and informed Morelli of the liquor.

Such conduct on the part of Morelli, a Government informer, clearly constituted an impermissible creation of crime by the Government under the holding in *Sherman*. The undisputed testimony showed that Cuddeback was not desirous of becoming involved with the liquor in any manner, and it was only after persistent urging and appeals to sympathy on the part of Morelli that Cuddeback became involved. It was further shown by the undisputed testimony that Cuddeback became involved with disposing of the liquor as a direct result of Morelli's pleas. Clearly, Cuddeback was an unwary innocent for whom a trap had been set.

Cuddeback's physical condition at the time of his conversation with Morelli regarding the liquor makes his situation even more analogous to that of the petitioner in *Sherman*. In *Sherman*, the petitioner was recovering from drug addiction at the time that the Government informer induced him into illegal conduct. In the present case, Cuddeback was recovering from a recent heart operation at the time that Morelli induced him to become involved in disposing of the liquor. Cuddeback's weakened physical condition, as was the case in *Sherman*, made him more susceptible to Morelli's urgings than he would have been under normal conditions. Indeed, it was precisely the situation where a Government agent takes advantage of a person's weakened physical state in order to induce him into criminal activity that the Supreme Court sought to prevent by its holding in *Sherman*.

It may be contended that the Government did not seek out Morelli's assistance in its investigation of the allegedly stolen liquor, and that, therefore, Morelli was not acting as an agent for the Government at the time of his first conversation with Cuddeback regarding the liquor. However, the Government informer in *Sherman* also acted on his own initiative at first, and later, "assured of a catch", the informer related the matter to the authorities so that they could "close the net". 356 US at 373. The Supreme Court's response to that set of circumstances was as follows:

> "The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the investigator of at least two other prosecutions. * * * The Government cannot make such use of an informer and then claim disassociation through ignorance." 356 US at 373–375.

Similarly, in the present case Morelli had served as an informant for the Federal Bureau of Investigation prior to his involvement with Cuddeback, and had helped Special Agent Lopez in two prior matters. Unlike Kalchinian, Morelli had previously been paid by the Government for his services. Under such circumstances, the Government cannot disown Morelli and insist that it is not responsible for his actions.

Neither can the Government assert that entrapment cannot be found as a matter of law because the evidence showing entrapment, albeit undisputed, was put forward by the defense. It is true that the Court in *Sherman* reached its holding based upon the undisputed testimony of a prosecution witness. However, entrapment was not found as a matter of law in *Sherman* because the testimony establishing it was presented by the prosecution, but because the testimony was undisputed. Here, the Government failed to rebut any of the evidence

presented by the defense relating to the first conversation between Cuddeback and Morelli regarding the liquor, at which point the entrapment took place. Morelli, who would have been in the best position to refute the defense testimony establishing entrapment, was not called by the Government as a witness although his identity as an informer was well known to both defendants at the time of trial and there was no need to protect his identity. The Government should not be permitted to insist that evidence presented by the defense is inherently less reliable than evidence put forward by the prosecution, and yet fail to present any evidence which would put the defense testimony in dispute.

It is noteworthy that the evidence which established entrapment as a matter of law in *Sherman* came from the testimony of the informant himself. It would be a strange result if the Government could avoid the effects of *Sherman* by simply failing to call the informant, who engaged in the improper inducement, as a witness and leaving all direct testimony regarding entrapment to the defense witnesses.

Since all of the evidence put forward at trial establishing entrapment was undisputed, entrapment has been established as a matter of law. Therefore, as in *Sherman*, Cuddeback's convictions should be reversed, and the charges against him should be dismissed.

D

PETITIONERS HAD NO KNOWLEDGE THAT LIQUOR WAS STOLEN

In the instant case, both Petitioners testified that they, in fact, did not know that the liquor was stolen. Petitioner Ranzoni testified that he was told by Bob Carr that the load of

liquor would be given over by the owners in order to perpetrate an insurance fraud. Ranzoni was to pay One Thousand Dollars in advance to Carr to pay to the owners and upon receipt of insurance proceeds, owners were to receive one-third of the proceeds. Petitioner Cuddeback testified that he was told by Ranzoni that the liquor was not stolen. The lower court erroneously found that there was sufficient evidence, considering the entire record read in the light most favorable to the government to support the jury's finding of knowledge by each petitioner. The facts cited by the court below in imputing knowledge to the Petitioners of stolen goods are all consistent with the goods being disposed of for insurance purposes.

Knowledge that the goods were stolen is one of the essential elements of 18 USC 2315 and is subject to being proven beyond a reasonable doubt. *Jackson* v *Virginia*, 443 US 307 (1979). Under the *Jackson* v *Virginia* doctrine, the relevant question is whether, after viewing the evidence in the light most favorable to the Government, the rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In the instant case, Ranzoni testified that he told Cuddeback that the liquor was not stolen. Special Agent Lopez testified that Cuddeback had referred to the liquor as stolen. However, the conversation to which Lopez refers was recorded without Cuddeback's knowledge and such failed to reveal that Cuddeback knew that the liquor was stolen or that there was any reference by Cuddeback that the liquor was stolen.

The evidence at trial with regard to the Petitioners' guilty knowledge was nil or so slight that no rational trier of fact could have found beyond a reasonable doubt that they had the necessary knowledge for a conviction under 18 USC 2315.

Therefore, the conviction of the Petitioners should be reversed and the charges brought against them should be dismissed.

CONCLUSION

For the reasons outlined above, Petitioners respectfully request that this most Honorable Court grant their Petition for Writ of Certiorari, or in the alternative, that the Opinion and Order of the Sixth Circuit Court of Appeals be summarily reversed.

Respectfully submitted,

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APPENDIX A

NO. 83-1518
83-1590

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed June 5, 1984)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

JOHN RANZONI (83-1518),
ROBERT CUDDEBACK (83-1590),
Defendants-Appellants

ORDER

Upon consideration of the appellants' motion to recall the mandate and reinstate the above-styled consolidated appeals pending application for Writ of Certiorari in the Supreme Court of the United States,

It is ORDERED that the motion be, and it hereby is, granted.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN R. HEHMAN

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 83-1518, 83-1590

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN RANZONI (83-1518),

and

ROBERT CUDDEBACK (83-1590),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 26, 1984

Before: KENNEDY, Circuit Judge; PECK, Senior Circuit Judge; and UNTHANK, District Judge.*

PECK, Senior Circuit Judge. John Ranzoni and Robert Cuddeback were convicted at a jury trial of violating 18 U.S.C. § 2315 by receiving, bartering, concealing and selling liquor, which each knew was stolen from an interstate shipment. After their motions for a new trial were denied, each appealed.

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* Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

On August 20, 1982, two truckloads of alcoholic beverages owned by Mohawk Liquor departed Novi, Michigan bound for out-of-state destinations, including Erie and Youngwood, Pennsylvania. En route, the truckloads of liquor were stored for the night at a warehouse owned by Transportation Services, Inc. (TSI), located in Brownstown Township, Michigan. On August 22, 1982, after the first truck had departed, the designated driver of the second truck appeared at the TSI warehouse to continue the journey to Pennsylvania. He discovered, however, that the truckload of liquor had been stolen.

Upon learning of the theft, Anthony J. Pellegrino, president and owner of TSI, contacted Special Agent Jess Lopez of the FBI and informed him of the theft. He also told Lopez that he would offer a reward of $5,000 (later raised to $10,000) for information concerning the whereabouts of the stolen liquor.

At about the same time Ranzoni received a telephone call from one Bob Carr. According to Ranzoni's testimony, Carr stated that he had received a truckload of liquor, consisting of 600 cases of alcoholic beverages, including mostly Kahlua, from an individual who wished to secretly sell the liquor and then report it as stolen to his insurance company. Ranzoni agreed to help Carr dispose of the liquor, paying Carr $1,000. Ranzoni initially sold 200 cases of the alcoholic beverages to an unnamed third party, but ran into difficulties trying to dispose of the remainder. Between September 7 and 14, 1982, Ranzoni telephoned Cuddeback, the owner of Bob's Hideaway, a bar located in Westland, Michigan. Ranzoni, after telling Cuddeback about the available liquor, apparently assured Cuddeback it was not stolen. Cuddeback, however, declined to purchase the liquor.

Shortly thereafter, Cuddeback spoke by telephone with Ed Morelli, the former operator of a nearby bar, Ma Bell's, concerning a debt that Morelli owed a friend of Cuddeback. After assuring Cuddeback that the debt would be paid,

Morelli inquired if Cuddeback knew of any "good deals" in the area. Thinking that Morelli sought to purchase a bar, Cuddeback stated that he knew of no bars available for sale. Morelli, declaring that he was short of cash, stated that he meant not just a bar, but anything that could make some money. Cuddeback then told Morelli about the Ranzoni offer of "liquor at a good price." Morelli stated that he was interested and asked Cuddeback to check further into the matter.

Morelli, who been an FBI informant on several occasions, last in 1979, telephoned his old friend, Special Agent Jess Lopez, informing Lopez of the liquor offer. Lopez told Morelli to set up a meeting involving Cuddeback, Ranzoni and himself to arrange a possible purchase.[1] That evening Cuddeback met with Morelli and Lopez at Bob's Hideaway to discuss the liquor transaction. Morelli indicated to Cuddeback that he could not make the purchase himself, due to his financial condition, but that his friend Lopez was interested in the deal. The three negotiated a price of $25 a case for the liquor which ordinarily sold for $100 a case. During the discussions Cuddeback stated to Lopez that Ranzoni had experienced great difficulty in disposing of the liquor since the "wrong truck was stolen" from the TSI warehouse.[2] Cuddeback contacted Ranzoni by telephone and obtained approval of the $25 a case purchase price. It was then decided that Lopez would come to Bob's Hideaway the next morning with the purchase money. Lopez would then pay Cuddeback once Lopez received word that his associates had taken possession of the liquor.

The next morning, September 24, 1982, Lopez, closely

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[1] Lopez, Pellegrino, Morelli, and Morelli's attorney met several hours later. Lopez agreed that Morelli would receive the Pellegrino reward if their plan resulted in an arrest and the recovery of the stolen liquor.

[2] Cuddeback indicated that a buyer had been located for the liquor aboard the first truck, which consisted of Scotch, tequila, and wine, but that the truckload of liquor, actually stolen, consisting primarily of Kahlua, was far less popular in the marketplace.

observed by several other FBI agents, entered Bob's Hideaway. At the same time, FBI agents prepared to meet with Ranzoni and his associates at the prearranged rendezvous point to receive the stolen liquor. At approximately 11:30 a.m. Lopez received a telephone call informing him that Ranzoni and his men had been arrested. Lopez thereupon arrested Cuddeback.

Ranzoni and Cuddeback, with two others,[3] were jointly indicted on one count of violating 18 U.S.C. § 2315. At trial, Ranzoni argued that he had not known the liquor was stolen, but instead thought he had been participating in an insurance fraud scheme. Cuddeback, while contending he had not known the alcoholic beverages were stolen, argued that he was entrapped by Morelli, a government informant, who had implanted the desire to get involved in the overall liquor transaction in the mind of Cuddeback.

During the trial, defense counsel discovered that a reward had been offered by Pellegrino and that Morelli had received the reward. Defense counsel also sought the government's help in locating Bob Carr, hoping to use Carr as a defense witness. The government, however, stated that it would take some five days to locate Carr, and that the trial was already in progress. Defense counsel made no subsequent effort to inform the trial judge about Carr or seek a continuance.

At the close of the evidence the jury was instructed on the necessary elements for finding a violation of § 2315. The jury was also given the opportunity to consider Cuddeback's entrapment defense. After deliberation, the jury found Ranzoni and Cuddeback guilty.

On appeal, Ranzoni and Cuddeback argue that § 2315's jurisdictional requirement that the stolen liquor was moving in interstate commerce had not been met because the liquor had not crossed a state line prior to its theft from the TSI warehouse. Both appellants further argue that insufficient evidence

[3] Donald Covington and John Paros pled guilty and did not appeal.

was introduced to show that either knew the alcoholic beverages were stolen. In addition, they argue that the government, by failing to inform them about the reward and the fact that Morelli had received a reward for his services, as well as by its refusal to disclose the whereabouts of Bob Carr, prevented them from receiving a fair trial, in violation of their due process right as defined in *Brady* v. *Maryland*, 373 U.S. 83 (1963). Finally Cuddeback argues he was entrapped as a matter of law, entitling him to an acquittal. After carefully considering each of these contentions we find them without merit and affirm the judgment of the district court *in toto*.

We initially turn to the question of whether the jurisdictional interstate commerce requirement of § 2315 was satisfied.[4] The government conceded that the stolen liquor had not left the state of Michigan at the time of its theft. This fact, they argue, is not controlling. Surprisingly few federal courts have considered the criteria for determining when goods are in interstate commerce for purposes of § 2315. In analyzing the question, the Eighth Circuit has adopted a flexible approach with an emphasis on practicality. *United States* v. *Henneberry*, 719 F.2d 941, 946 (8th Cir. 1983); *United States* v. *Singer*, 660 F.2d 1295, 1307-08 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982). Borrowing from prior case law interpreting the identical language of 18 U.S.C. § 659, which prohibits the theft of property in interstate commerce, the court, rather than focusing on the particular physical location of the

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[4] Section 2315, in pertinent part, provides:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . .
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . .

theft, considered the overall indicia of interstate commerce then existing. These included the intent of the consignor, conveyance of the goods by an interstate carrier when stolen, and the out-of-state or in-state destination of the goods at the time of the theft, and subsequent concealment, attempted barter or actual sale. The court considered each factor separately, none of which was independently determinative. Congress's intent, the court continued, plainly was to adopt a practical, common sense approach, avoiding overly technical formulations.[5] The determination, overall, being factual, depends on the circumstances in a particular case. *Henneberry, supra; Singer, supra. See also United States* v. *Luman*, 624 F.2d 152, 155 (10th Cir. 1980)(question of whether goods stolen are in interstate commerce for purposes of § 2315 a factual inquiry for the jury); *United States* v. *Tobin*, 576 F.2d 687, 691 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978)(same). *Cf. McElroy* v. *United States*, 455 U.S. 642, 659 (1982) (question of whether goods in interstate commerce for purposes of § 2314 a jury consideration). Finding this test persuasive, we apply it to the facts in this case to determine whether the jury cor-

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[5] The Supreme Court recently reached an identical conclusion interpreting similar language in 18 U.S.C. § 2314, prohibiting the transportation of a forged security in interstate commerce. *McElroy* v. *United States*, 455 U.S. 642, 659 (1982). In *McElroy*, the petitioner, a resident of the state of Ohio, was convicted of forging a check and cashing it in the state of Pennsylvania. The court rejected petitioner's argument that the government was required to prove the check was forged before petitioner crossed into Pennsylvania in order to satisfy the statute's interstate commerce requirement. Justice O'Connor, writing for the Court, indicated that Congress intended interstate commerce, for purposes of § 2314, to include commerce even before a state border was crossed. *Id.* at 653-54. At the same time Justice O'Connor indicated that such a technical construction of interstate commerce was inappropriate as well for other federal criminal statutes including § 2315. *Id.* at 656 & n.21. *See also United States* v. *Ajlouny*, 629 F.2d 830, 837 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (goods stolen from dock before shipped overseas are in foreign commerce for purposes of § 2314 violation despite the fact not crossed a national border); *United States* v. *Franklin*, 568 F.2d 1156, 1157 (8th Cir.), *cert. denied*, 435 U.S. 955 (1978) (court interpreting identical language of 18 U.S.C. § 659 to that used in § 2315 found fact that goods had not crossed state line before stolen irrelevant; jurisdictional requirement met).

rectly found that the jurisdictional interstate nexus was satisfied in the present case.

Here, even though the liquor was taken from the TSI warehouse before it left the state of Michigan, it plainly was being conveyed by interstate carriers on its journey to Pennsylvania. Mohawk Liquor of Novi, Michigan loaded the liquor aboard trucks and consigned it for sale in Pennsylvania. Bills of lading, as well as markings on the cases of liquor denoting approval of the Pennsylvania Liquor Control Commission for sale in Pennsylvania, evidenced Mohawk's intent. The fact that the liquor itself never reached Pennsylvania was due solely to unforeseen criminal intervention. Under the circumstances of this case, to hold that the liquor was not in interstate commerce because it never physically crossed a state border clearly would run counter to the intent of Congress to avoid technical and narrow constructions of § 2315. We therefore conclude that there was sufficient evidence for the jury to find that the liquor was moving in, a part of, or constituted interstate commerce, satisfying the jurisdictional requirement of § 2315.

Cuddeback and Ranzoni next assert that even if the liquor was moving in, a part of, or constituted interstate commerce, neither knew the alcoholic beverages were stolen. For his part Ranzoni contends that he believed he was participating in an insurance fraud, not proscribed by § 2315, rather than attempting to dispose of stolen property. Cuddeback argues that he believed assurances by Ranzoni that the liquor was not stolen.

Whether an individual knows property is stolen for purposes of § 2315 is clearly a question of fact reserved for jury consideration. *United States* v. *Bennett*, 665 F.2d 16, 23 (2d Cir. 1981); *United States* v. *Francis*, 646 F.2d 251, 261 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981); *Luman, supra* at 157. On review, this court's inquiry is limited to a determination of whether sufficient evidence, considering the entire record read in the light most favorable to the government, supports the

jury's finding of knowledge by each defendant. *Glasser* v. *United States*, 315 U.S. 60 (1942).

According to the evidence at trial Ranzoni came into possession of the stolen liquor shortly after it disappeared from the TSI warehouse. During September 1982, Ranzoni was extremely eager to dispose of the liquor as soon as possible. Despite markings on the liquor, indicating it had been approved for sale in Pennsylvania, and having an approximate fair market value of $100 per case, Ranzoni was willing to sell it to Lopez, a resident of Michigan, at $25 a case. The sale, itself, was conducted through an intermediary, Cuddeback, and arrangements were secretly formulated by telephone. We think these factors are sufficient to support the jury's finding that Ranzoni knew the liquor was stolen. *United States* v. *Enoch*, 694 F.2d 465, 466 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 2097 (1983); *United States* v. *Meyers*, 646 F.2d 1142, 1143 (6th Cir. 1981); *Francis, supra* at 261. Cuddeback, an experienced bar owner, secretly met with Morelli and Lopez, and was present when a sale of the liquor at a price far below its actual market value was negotiated. During negotiations, both Morelli and Lopez testified, Cuddeback commented on several occasions that the alcoholic beverages were stolen and that Ranzoni had encountered serious difficulties in disposing of the liquor since the "wrong truckload was stolen." Finally Cuddeback was willing to accept a briefcase full of money, rather than use a more conventional means of financing the sale. Despite denials by Cuddeback to the contrary, we conclude there was sufficient evidence to support the jury's finding that Cuddeback knew the liquor was stolen for purposes of § 2315.

We similarly find no merit in appellants' contention that the government's failure to inform them about the reward received by Morelli, and its failure to assist defense counsel in locating Bob Carr, constituted *Brady* violations. Since appellants failed to request the information from the government before trial, they must show that the evidence not disclosed by the government created a reasonable doubt about their guilt in the

mind of the jury which had not existed before. *United States* v. *Agurs*, 427 U.S. 97, 112 (1976); *Perkins* v. *Le Fevre*, 691 F.2d 616, 619 (2d Cir. 1982); *United States* v. *Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981). This they plainly cannot do. Evidence concerning the reward was introduced by the government at trial, clearly allowing the jury to consider its impact in reaching its verdict. At the same time, appellants present nothing that would suggest that the testimony of Carr would have altered the outcome of the trial. We therefore conclude appellants received a fair trial in all respects.

We finally have no difficulty in disposing of Cuddeback's entrapment argument. Cuddeback failed to admit each and every element of the § 2315 violation with which he was charged, a necessary prerequisite to raising an entrapment defense. *United States* v. *Bryant*, 716 F.2d 1091, 1094 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1006 (1984); *United States* v. *Mitchell*, 514 F.2d 758, 761 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975). Since Cuddeback did not admit that he knew the liquor was stolen, he could not assert his entrapment defense at trial and cannot raise it on appeal.

Having found each of the arguments raised by the appellants to be without merit, we affirm the district court judgment.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs.

Criminal
No. 82-80466

JOHN RANZONI,
Defendant

MEMORANDUM OPINION AND ORDER

Defendant has been convicted by a jury of violating 18 U.S.C. § 2315, receipt of goods stolen from interstate commerce. He has now filed a motion for a new trial pursuant to Fed.R.Crim.P. 33. The parties have briefed the issues and have waived oral argument. For the following reasons, defendant's motion is hereby denied.

Defendant makes three arguments in support of his motion. First, he argues that there was insufficient evidence to prove that he knew that the goods in question were stolen. The government has correctly summarized the evidence which supported the jury's verdict on this issue, however. There was evidence that defendant was in possession of the stolen cases of liquor within hours after their theft; the jury could infer from this alone that defendant knew that the goods were stolen. Moreover, co-defendant Donald Covington testified that Ranzoni told him that the liquor was stolen. Finally, the cases were shown to have identifying labels from the Pennsylvania Liquor Control Commission; this was further evidence of Ranzoni's knowledge of their unlawful acquisition. There was

clearly sufficient evidence to support a jury verdict that defendant Ranzoni knew that the goods were stolen.

Second, defendant argues that the government withheld certain evidence from the defendants and that this was prejudicial to the defendants. Defendant has failed to establish, however, that he ever requested the government to produce this evidence, that the government had a duty to produce it, or that he has suffered any prejudice as a result of the alleged withholding. This argument is therefore without merit.

Finally, defendant argues that the Court failed to read the government's witness list to the jury in order to determine whether any of the jurors knew any of the witnesses. Defendant never requested the Court to read this witness list to the jury; any such timely request would have been honored. Moreover, defendant has utterly failed to demonstrate any prejudice in this regard. This is a frivolous argument which clearly does not mandate a new trial.

In sum, defendant has not established any justification for the grant of a new trial. His motion is therefore denied.

IT IS SO ORDERED.

/s/ PHILIP PRATT
PHILIP PRATT
United States District Judge

Dated: July 19, 1983
Detroit, Michigan

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

(Filed July 5, 1984)

UNITED STATES OF AMERICA

vs.

JOHN J. RANZONI — 82-80466-4
Defendant

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 5, 1983 with counsel Armand Bove.

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of possession of goods stolen from Interstate Shipment 18:USC:2315

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) years and that defendant shall become eligible for parole, under 18 U.S.C. Section 4205(b)(2), at such times as the Parole Commission may determine.

IT IS FURTHER ADJUDGED that the execution of said sentence be stayed until Monday, July 18, 1983 at 9:00 A.M., at which time the defendant is to surrender to the United States Marshal to begin service of said sentence.

IT IS FURTHER ADJUDGED that the defendant's bond will not be exonerated until the defendant reports to the United States Marshal as aforesaid.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ PHILIP PRATT

PHILIP PRATT
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

vs.

ROBERT CUDDEBACK — 82-80466-3
Defendant

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 5, 1983 with counsel Dennis N. Powers.

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of Possession of Goods Stolen From Interstate Shipment 18:USC:2315

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years under U.S.C. Section 4205(b)(2). The Court suspends execution of all but the first Ninety (90) days, and places the defendant on probation for a period of Two (2) years. Such probationary period to begin on the date he is released from custody.

IT IS FURTHER ADJUDGED that the execution of said sentence be stayed until Monday, July 18, 1983 at 9:00 A.M., at which time the defendant is to surrender to the United States Marshal to begin service of said sentence.

IT IS FURTHER ADJUDGED that the defendant's bond will not be exonerated until the defendant reports to the United States Marshal as aforesaid.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ PHILIP PRATT

PHILIP PRATT
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
(Filed May 6, 1983)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Criminal
No. 82-80466-4

JOHN J. RANZONI,
Defendant.

JURY VERDICT

At a session of said Court held in the Federal Building, Detroit, Michigan, this 29th day of April, 1983.

PRESENT: Honorable Philip Pratt
United States District Judge

The jurors heretofore empanelled and sworn come into Court again and sit together, and having heard the arguments of counsel and charge of the Court, retire from the bar thereof under charge of an officer (duly sworn for that purpose) to consider their verdict; and after being absent for a time come into Court again and in the presence of said defendant say upon their oaths they find the defendant John J. Ranzoni GUILTY as charged in the Indictment in Criminal No. 82-80466.

WHEREUPON the jury is excused from further consideration of this case.

IT IS FURTHER ORDERED that the appearance bond of the defendant is continued in full force and effect and defendant is referred to the Probation Department for a presentence investigation.

Examined, approved and ordered entered.

/s/ PHILIP PRATT

United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
(Filed May 6, 1983)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Criminal
No. 82-80466-3

ROBERT CUDDEBACK,
Defendant.

JURY VERDICT

At a session of said Court held in the Federal Building, Detroit, Michigan, this 29th day of April, 1983

PRESENT: Honorable Philip Pratt
United States District Judge

The jurors heretofore empanelled and sworn come into Court again and sit together, and having heard the arguments of counsel and charge of the Court, retire from the bar thereof under charge of an officer (duly sworn for that purpose) to consider their verdict; and after being absent for a time come into Court again and in the presence of said defendant say upon their oaths they find the defendant Robert Cuddeback GUILTY as charged in the Indictment in Criminal No. 82-80466.

WHEREUPON the jury is excused from further consideration of this case.

IT IS FURTHER ORDERED that the appearance bond of the defendant is continued in full force and effect and defendant is referred to the Probation Department for a presentence investigation.

Examined, approved and ordered entered.

/s/ PHILIP PRATT

United States District Judge